Supreme Court, U.S.
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No. 07-405

IN THE

Supreme Court of the United States

NAOMI WALTON, PETITIONER

v.

U.S. MARSHALS SERVICE; MARC A. FARMER, CHIEF, JUDICIAL PROTECTIVE SERVICES-JUDICIAL SECURITY DIVISION; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; BENIGNO G. REYNA, DIRECTOR, UNITED STATES MARSHALS SERVICE; ALBERTO R. GONZALES, ATTORNEY GENERAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Naomi Walton filed a civil action against the United States Marshals Service and Respondent, United States Attorney General Alberto Gonzales, for disability discrimination. Walton was terminated from her fourteen year career as a Court Security Officer because Respondent regards her as having a hearing impairment which makes her "unable" to localize sound despite the fact that her actual impairment is not that limiting. In an Order dated September 13, 2007, the district court granted Respondent's motion for summary judgment on the ground that Walton failed to establish a *prima facie* case for being "regarded as" disabled, as defined in the Rehabilitation Act of 1973, 29 U.S.C. 705 (20) (B). The Ninth Circuit Court of Appeals affirmed the district court's order granting Respondent's motion for summary judgment but on different grounds, not previously addressed by the parties or by the district court. The Ninth Circuit held that being unable to localize sound may severely impact how hearing is used in daily life, *but* that it is "mitigated" by visual localization. *Walton v. United States Marshals Service, et al.*, 476 F.3d 723 (9th Cir. 2007). (App.1a) as amended, *Walton v. United States Marshals Service, et al.* 492 F.3d 998 (9th cir. 2007) (App.18a).

The questions presented are:

Whether the Ninth Circuit's opinion in *Walton v. United States Marshals Service, et al.*, 492 F.3d 998 (9th cir. 2007) (App. 18a) is correct in holding that mitigating measures overcome a claim for being "regarded as" disabled or whether the Ninth Circuit has decided this important federal question in a way that conflicts with

this Court's decisions in *Sutton v. United Airlines*, 527 U.S. 471, 488, 119 S.Ct. 2139, 144 L.Ed. 2d 450 (1999) and *Murphy v. United Parcel Service*, 527 U.S. 516, 521-522, 119 S.Ct. 2133, 144 L.Ed.2d 484 (1999), both of which decide "regarded as" disabled claims without consideration of the mitigating measures which "relieved" the actual disabilities and whether the Fifth Circuit's decision in *Rodriguez v. Con Agra*, 436 F.3d 468 (5th Cir. 2006) is correct in holding that the foundation of being "regarded as" disabled is the mis-perception of a disability, so without a substantial limitation there is nothing to mitigate or control?

Whether the Ninth Circuit's decision in *Walton v. United States Marshals Service, et al.*, 492 F.3d 998 (9th cir. 207) (App., 18a) is correct in holding that use of visual localization mitigates the inability to localize sound or whether the Ninth Circuit has decided this important federal question in a way that conflicts with this Court's decision in *Sutton v. United Airlines*, 527 U.S. 471, 488, 119 S.Ct. 2139 (1999), which holds that use of a corrective device does not relieve one's disability if, notwithstanding use of the corrective device, a major life activity is still substantially limited and whether the Second Circuit 's decision in *Capobianco v. City of New York*, 422 F.3d 47, 59 (2d Cir. 2005) is correct in holding that "mitigation" refers to amelioration of the impairment itself, not avoidance of activities affected by the impairment?

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PETITION FOR A WRIT OF CERTIORARI

Naomi Walton respectfully petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on February 9, 2007, amended June 26, 2007, in order to resolve conflicts between the Ninth Circuit, and this Court's decisions in *Sutton v. United Airlines*, 527 U.S. 471, 488 , 119 S.Ct. 2139 (1999) and *Murphy v. United Parcel Service*, 527 U.S. 516, 521-522, 119 S.Ct. 2133 (1999)as well as conflict with Fifth Circuit's decision in *Rodriguez v. Con Agra* , 436 F.3d 468 (5th Cir. 2006). The Ninth Circuit opinion in this case holds that mitigating measures overcome "regarded as" disabled claims but this Courts decisions in *Sutton, supra,* and *Murphy, supra,* both of which decide "regarded as" disabled claims without consideration of the mitigating measures which overcame the actual disabilities and the Fifth Circuit's decision in *Rodriguez v. Con Agra, supra,* holds that there is nothing to mitigate or control in a "regarded as" disabled claim because the foundation of "regarded as" disabled is that there is no substantial limitation.

Naomi Walton also respectfully petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on February 9, 2007, amended June 26, 2007, in order to resolve the conflict between the Ninth Circuit's opinion in this case which holds that visual localization mitigates the inability to localize sound, despite the fact that vision cannot cure or ameliorate a substantially limiting hearing impairment and this Court's decision in *Sutton v. United Airlines*, 527 U.S. 471, 488 , 119 S.Ct. 2139 (1999) which holds that use of a corrective device does not relieve one's disability if, notwithstanding use

of the corrective device, a major life activity is still substantially limited. The Ninth Circuit's opinion also conflicts with the Second Circuit's decision in *Capobianco v. City of New York*, 422 F.3d 47, 59 (2d Cir. 2005) which holds that "mitigation" refers to amelioration of the impairment itself, not avoidance of activities affected by the impairment.

The Court is squarely presented with a holding that contradicts the very foundation of the "regarded as" disabled definition of disability as well as the very foundation of what constitutes a mitigating measure sufficient to overcome a disability. With this opinion the Ninth Circuit has created a clear conflict with decisions of this Court and other Circuits, by re-defining key elements of the Rehabilitation Act 29 U.S.C. §701 *et seq* and the Americans with Disabilities Act, 42 U.S.C.A. § 12102(2).1 Therefore the Court should reverse the Ninth Circuit's opinion in this case.

OPINIONS BELOW

The original opinion of the United States Court of Appeals for the Ninth Circuit is dated February 9, 2007and was published at *Walton v. United States Marshals Service, et al.*, 476 F.3d 723 (9th Cir. 2007). (App.1a) The amended opinion is dated June 26, 2007 and is published at *Walton v. United States Marshals Service, et al.* 492 F.3d 998 (9th cir. 2007) (App.18a), as is the Order Amending Opinion and Denying Petition for Rehearing

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1 The Standards of substantive liability under the Rehabilitation Act are the same as those applied under the Americans with Disabilities Act, of 1990,(ADA) 42 U.S.C.A. § 12102(2). *Coons v. Sec'y of the U.S. Dept't. of the Treasury*, 383 F.3d 879, 884 (9th Cir. 2004).

and Petition for Rehearing En Banc. (App. 57a)[2] The Order granting Respondent's motion for summary judgment, District Judge Susan Illston, United States District Court for the Northern District of California, *Walton v. United States Marshals Service* is dated September 13, 2005 and is unpublished. (App.38a).

JURISDICTION

The judgment of the United Sates Court of Appeals for the Ninth Circuit was entered on February 9, 2007. A Petition for Rehearing and Petition for Rehearing En Banc was timely filed. On June26,2007 the Petitions for Rehearing and for Rehearing En Banc were denied. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of the Petition for Rehearing or for Rehearing En Banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1)

RELEVANT PROVISIONS INVOLVED

29 U.S.C. 705 (20) (B)

> (20) Individual with a disability
>
> (B) Certain programs; limitations on major life activities Subject to subparagraphs (C), (D), (E), and (F), the term "individual with a disability" means, for purposes of sections 701, 711, and 712 of this title and subchapters II, IV, V, and VII of this chapter [29 U.S.C.A. §§ 760 et seq., 780 et seq., 790 et seq., and 796 et seq.], any person who--

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[2] The amended opinion supersedes the original opinion but does not change the holding at issue in Petition for Certiorari.

(I) has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) has a record of such an impairment; or

(iii) is regarded as having such an impairment.

29 CFR 1630.2 (g)(h)(i)(j)(k)(l)

(g) Disability means, with respect to an individual-

(1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) A record of such an impairment; or

(3) Being regarded as having such an impairment.(See § 1630.3 for exceptions to this definition).(h) Physical or mental impairment means:(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.(j) Substantially limits—

1. (1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(k) Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.(l) Is regarded as having such an impairment means:

1. (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

STATEMENT

In August , 2003, Petitioner Naomi Walton was disqualified from her position as a Court Security Officer

on the basis of a report by a contract Medical Reviewer who misinterpreted Walton's audiological test results and concluded that,

> "You have a significant hearing impairment according to the results of the tests provided by you from Gould Medical Foundation. According to the test results you have only one functioning ear, you are unable to localize the direction of sound, an essential job function. Hearing aids may malfunction or become dislodged in critical situations. Your job requires the ability to detect where sound is coming from. Your inability to do so poses a significant risk to the health and safety of yourself, other law enforcement officers, and the public." (App.21a)

After exhausting her administrative remedies Walton filed a timely Complaint in the United States District Court for the Northern District of California, which was later amended to include a claim for disability discrimination in violation of the Rehabilitation Act of 1973, 29 U.S.C. §701 *et seq.* The basis for federal jurisdiction in this court of first instance was federal question jurisdiction, 28 U.S.C. §1331

In an Order dated September 13, 2005, the district court granted Respondent's motion for summary judgment on the ground that Walton failed to establish a *prima facie* case of being regarded as disabled.

The Ninth Circuit Court of Appeals affirmed the District Court's order granting summary judgment to Respondent, but on grounds that had not previously been addressed by the parties or by the district court.

Referencing a section of a report on auditory localization of sound, prepared by Dr. Lynn Cook, the Ninth Circuit concluded that

> "...a complete inability to localize sound may severely impact how hearing is used in daily life..." *but* "...we view the inability to localize sound as being mitigated by visual localization." (App. 12a, Amended Opinion 29a)

The Ninth Circuit based this conclusion about visual localization mitigating the inability to localize sound on a portion of Dr. Cook's report which says that "visual localization is generally just as accurate" as auditory localization (App.29a) but

> "[Visual localization] 'is not nearly as efficient (quick) as auditory localization' and it 'assumes that th source of the sound can be visualized, which is often not possible in low-light environments, when the source is visually obscured by other objects, or when the source is not visually apparent (as in the bank of radios above).' " (App.13a Amended Opinion 30a)

A timely Petition for Rehearing or Rehearing En Banc was denied on June 26, 2007 and although the Ninth Circuit amended the opinion at that time, the amendment does not change the holding at issue in this Petition for Certiorari. (App. 18a, 57a).

This Court should now consider the Petitioner's claim that a "regarded as" disabled case should be decided without regard to mitigating measures and resolve the clear conflict between the way this important federal

question has been decided by the Ninth Circuit, holding that the perception that Petitioner is unable to localize sound is mitigated by visual localization, and this Court's decisions in *Sutton v. United Airlines*, 527 U.S. 471, 488 , 119 S.Ct. 2139 (1999) and *Murphy v. United Parcel Service*, 527 U.S. 516, 521-522, 119 S.Ct. 2133 (1999), both of which decide "regarded as" disabled claims without consideration of the mitigating measures which overcame the actual disabilities. Consideration of the Petitioner's claim that a "regarded as" disabled case should be decided without consideration of mitigating measures would also resolve the clear conflict between the Ninth Circuit and the Fifth Circuit's decision in *Rodriguez v. Con Agra* 436 F.3d 468 (5th Cir. 2006) which holds that because the foundation of a "regarded as" disabled claim is that there is no actual disability, there can be nothing to mitigate or control.

This Court should now also consider Petitioner's claim that vision cannot be a mitigating measure for a hearing impairment because mitigating measures do not overcome a disability unless they correct or ameliorate the impairment causing the substantial limitation to a major life activity. Consideration of this issue will resolve the clear conflict between the way this important federal question has been decided by the Ninth Circuit, holding that visual localization mitigates the inability to localize sound, and this Court's decision in *Sutton v. United Airlines*, 527 U.S. 471, 488 , 119 S.Ct. 2139 (1999) which holds that corrective measures do not overcome a substantial limitation on a major life activity if, notwithstanding the corrective measure a major life activity is still substantially limited. Vision cannot correct or ameliorate a hearing impairment perceived to have caused a complete loss of the ability to localize sound

- tell where sound is coming from. Visual localization can only provide a means of avoiding activities affected by the inability to localize sound. This Ninth Circuit opinion creates a direct conflict with the Second Circuit decision in *Capobianco v. City of New York*, 422 F.3d 47, 59 (2d Cir. 2005), which holds that avoiding activities affected by the impairment is not mitigation within the context of overcoming a disability.

The Court is now presented with the opportunity to correct the Ninth Circuit's conflict with the Court's decisions and decisions in other circuits over these important federal questions that are so key to application of the federal disability rights statutes.

REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit Court of Appeals' opinion in *Walton v. United States Marshals Service, et al.* is in conflict with the Court's decisions in in *Sutton v. United Airlines* and *Murphy v. United Parcel Service* as well as the Fifth Circuit's decision in *Rodriguez v. Con Agra* and the Second Circuit's decision in *Capobianco v. City of New York*

The Ninth Circuit Court of Appeals' opinion in this case has created conflict with the decisions of this Court and with other Circuits over whether mitigating measures can overcome a "regarded as" disability.

An individual with a disability is defined in three ways by both the Rehabilitation Act of 1973, 29 U.S.C. 705 (20) (B) and the Americans with Disabilities Act 42 U.S.C. § 12102.

An individual with a disability,

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) has a record of such an impairment; or

(iii) is regarded as having such an impairment

Being "regarded as" disabled means being regarded as having an impairment which substantially limits one or more of a person's major life activities, is defined at 29 CFR 1630.2 (k) as meaning that an individual (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially
limits major life activities only as a result of the attitudes of others toward such impairment; or
(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

In *Sutton v. United Airlines*, 527 U.S. 471, 488, 119 S.Ct. 2139 (1999) the Court defined "regarded as" disabled as meeting one of two criteria:

(1) A covered entity mistakenly believes that a person has a physical impairment that

> substantially limits one or more major life activities, or
> (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. 527 U.S. at 489.
> In *Sutton* the Court went on to say that "In both cases, it is necessary that a covered entity entertain misperceptions about the individual - it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fat, the impairment is not so limiting." *Id.*

1. Mitigating measures are not relevant to "regarded as" disabled cases

In 2006 the Fifth Circuit Court of Appeals decided *Rodriguez v. Con Agra* 436 F.3d 468, 479 (5th Cir. 2006), based on the simple but compelling observation that in a "regarded as" disabled case, there is no actual "substantial limitation on a major life activity" so there is nothing to mitigate. As the Fifth Circuit said,

> " In stark and compelling contrast [to actual disability], 'regarded as' disability claims, like Rodriguez's are grounded in the foundational distinction that the plaintiff's impairment is not substantially limiting. Stated differently, in this and all other cases involving only a 'regarded as' disability claim, there is nothing for the plaintiff to control or mitigate."

See also, the Sixth Circuit's decision *in MX Group Inc. v. City of Covington*, 293 F.3d 326, 340 (6th Cir. 2002), which

says, "Under the regarded as prong, this Court does not even focus on the disability, but on the perception of the employer regarding the perceived disability. "

In 2005 the Second Circuit decided *Capobianco v. City of New York*, 422 F.3d 47, 57 (2d Cir. 2005). Quoting from earlier decisions in *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 646 (2d Cir.1998) and *Francis v. City of Meriden*, 129 F.3d 281, 284 (2d Cir.1997), the Second Circuit Court of Appeals said, "a 'regarded as' claim 'turns on the employer's perception of the employee' and is therefore 'a question of intent, not whether the employee has a disability.' "

The Ninth Circuit's Opinion in this case indicates that it considered mitigating measures in this "regarded as" disabled case in order to determine whether the impairment the employer mis-perceived was "objectively" a "disability" under the Act. (App.30a). That rationale, however, is in clear conflict the Court's decisions in *Sutton v. United Airlines*, 527 U.S. 471, 488 , 119 S.Ct. 2139 (1999) and *Murphy v. United Parcel Service*, 527 U.S. 516, 521-522, 119 S.Ct. 2133 (1999), both of which demonstrate that overcoming actual disabilities with mitigating measures does not bar consideration of "regarded as" disabilities based on the "perceived" substantial limitations, without taking mitigating measures into consideration. In *Sutton* the Court illustrated that point with an example,

> "Alternatively, one whose high blood pressure is "cured" by medication may be regarded as disabled by a covered entity, and thus disabled under subsection (c) of the definition." *Sutton, supra*, at 488.

There is neither logical nor legal support for the Ninth Circuit's conclusion that mitigating measures must be considered in a "regarded as disabled" case to determine whether the impairment the employer misperceived is "objectively" a "disability" under the Act, or for any reason.

B. The Ninth Circuit Court of Appeals' opinion in *Walton v. United States Marshals Service, et al.* is in conflict with the Court's decision in *Sutton v. United Airlines* as well as the Second Circuit's decision in *Capobianco v. City of New York*.

The Ninth Circuit's opinion in this case concluded that

> "...a complete inability to localize sound may severely impact how hearing is used in in daily life..."
> *but*
> "...we view the inability to localize sound as being mitigated by visual localization." (App. 29a)

Use of vision to overcome a severe impact on how hearing is used in daily life expands the concept of "mitigating measures" beyond any limits contemplated by the Court's decision in *Sutton v. United Airlines*. Again, the Ninth Circuit's opinion in this case creates clear conflict with the Court's decisions as well as with decisions in other Circuits, such as the Second Circuit's decision in *Capobianco v. City of New York*.

The Court's decision in *Sutton v. United Airlines* assured the dissenting members that individuals would not be excluded from the protections of the Americans

with Disabilities Act simply by virtue of using a prosthetic device or medication because , "The use of a corrective device does not, by itself, relieve one's disability. Rather, one has a disability under subsection (A) if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity." (emphasis added) *Sutton supra*, at 488.

As the Second Circuit said, in *Capobianco v. City of New York*, 422 F.3d 47, 59 n.9, "In this context, mitigation refers to amelioration of the impairment itself, not simple avoidance of activities affected by the impairment."

In this case, however, the Ninth Circuit is calling the use of vision a mitigating measure for the inability to use hearing to localize sound, despite the fact that vision cannot in any way correct or this substantial limitation on the major life activity of hearing.

1. The Court's decision in *Albertson's v. Kirkingburg* does not justify this departure from existing Supreme Court authority and other Circuit Courts

In its opinion the Ninth circuit cites *Albertson's v. Kirkingburg*, 527 U.S.555, 565-566, 119 S.Ct. 2162, 144 L.Ed.2d 518, (1999) as authority for its conclusion that vision can mitigate hearing loss for purposes of the ADA. The opinion refers to the statement in *Albertson's* that there is no "principled basis" for distinguishing between mitigating measures undertaken with medications and devices and measures undertaken with "the body's own systems." (App. 29a)

However, the Ninth Circuit has mis-read *Albertson's*. *Albertson's* does not support this expansion of the concept of mitigatint measures because the Court's reference to using the body's own systems refers to "compensating adjustments in visual techniques...." (emphasis added) *supra*, at 565. Clearly, the Court was not contemplating mitigating the limitations of monocular vision with hearing and it is equally inapposite to mitigate substantial limitations in hearing, with the use of visual techniques.

Furthermore, *Albertson's* was published in conjunction with *Sutton v. United Airlines* as part of a trilogy of disability cases published at the same time.

There is no reason to believe that the Court intended its holding in *Albertson's* to reverse *Sutton's* rule, that a disability is not "relieved" if the major life activity affected is still "substantially limited" and that compensating measures which may assist the individual to *function* in society, but which do not correct the substantial limitation on a major life activity, do *not* "relieve" the disability. *Sutton, supra*, at p.488.

"...[I]ndividuals who use prosthetic limbs or wheelchairs may be mobile and capable of functioning in society but still be disabled because of a substantial limitation on their ability to walk or run." *Sutton, supra*, at p.488. See also, *Equal Employment Opportunity Commission v. J. H. Routh Packing Co.*, 246 F.3d 850, 854 (6th Cir. 2001) in which the Sixth Circuit held that controlling a disability or lessening its symptoms in order to function does not necessarily mean removing a disability.

The Ninth Circuit's opinion in this case obscures

the line between correcting or ameliorating a disabling condition and using alternatives, in order to keep functioning. The logical extension of the Ninth Circuit's opinion is that a blind individual will not be subject to the protections of the federal disability statutes unless that individual is blind as well.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,
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(any footnotes trail end of each document)

No. 05-17308

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NAOMI WALTON,
Plaintiff-Appellant,

v.

U.S. MARSHALS SERVICE; MARC A. FARMER, Chief, Judicial Protective Services-Judicial Security Division; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; BENIGNO G. REYNA, Director, United States Marshals Service; ALBERTO R. GONZALES,
Attorney General, Defendants-Appellees.

November 16, 2006, Argued and Submitted, Portland, Oregon

February 9, 2007, Filed

COUNSEL: Edith J. Benay, San Francisco, California, for the plaintiff-appellant.

Eric Fleisig-Greene, United States Department of Justice, Washington, DC, for the defendant-appellee.

JUDGES: Before: Alfred T. Goodwin, Raymond C. Fisher, and Milan D. Smith, Jr., Circuit Judges.

OPINION BY: Milan D. Smith, Jr.

OPINION

SMITH, Circuit Judge:

Naomi Walton sued the U.S. Marshals Service ("USMS") under the Rehabilitation Act of 1973 alleging that the USMS unlawfully discharged her because of her hearing impairment. She appeals from the district court's grant of summary judgment in favor of the USMS, arguing that the district court erred in ruling that she failed to demonstrate a genuine issue of material fact concerning whether she was disabled within the meaning of the Acts.[1] We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I. Background

Walton was employed by Akal Security, Inc. ("Akal") as a Court Security Officer ("CSO") at the United States District Court for the Northern District of California. Akal is a private contractor that provides CSOs at federal courthouses within the Ninth Circuit by contract with the USMS. The contract requires that Akal employees for CSO positions meet certain USMS physical requirements. Based on the USMS's determination that Walton did not meet the USMS's audiological standards, the USMS medically disqualified her from employment as a CSO and Akal terminated her employment.

In its agreement with Akal, the USMS requires CSOs to undergo annual physical examinations. The USMS's current CSO audiological standards were developed based upon a study by Dr. Richard Miller, Director of Law Enforcement Medical Programs for the Office of

Federal Occupational Health. Dr. Miller's study identified twenty-nine job functions essential to the CSO position, one of which is the ability to determine the location and source of sound. The Judicial Conference of the United States adopted the conclusions of Dr. Miller's study and directed the USMS to implement a number of changes to the CSO medical standards.

In November 2001, as a part of an annual physical examination required by her employment contract, Walton underwent audiological testing by an Akal-designated physician. Dr. Louis Chelton, a medical review officer in the Office of Federal Occupational Health, reviewed the results of Walton's test in order to assess her compliance with USMS standards. Based on Walton's test results, Dr. Chelton noted that Walton has a disparity between her two ears' ability to detect sound, and that this disparity impacts her ability to localize sound.

Consistent with USMS policy, Walton was given an opportunity to provide further test results or other information to support her qualification before the USMS made a final recommendation concerning her medical eligibility. Walton took this opportunity and underwent a second hearing test. Dr. Chelton reviewed the additional results and reported on a "Medical Review Form" that Walton was "[n]ot medically qualified to perform the essential functions of the job." The form reads, in relevant part:

The following medical condition(s) poses a significant risk to the health and safety of yourself and/or others in the performance of essential job functions. Medical

follow-up, if requested, and any reduction of duties are listed below. Send medical information to your employer.

You have a significant hearing impairment according to the results of the tests provided by you from Gould Medical Foundation. According to the test results you have only one functioning ear. With only one functioning ear, you are unable to localize the direction of sound, an essential job function. Hearing aids may malfunction or become dislodged in critical situations. Your job requires the ability to detect where sound is coming from. Your inability to do so poses a significant risk to the health and safety of yourself, other law enforcement officers, and the public. The USMS then notified Akal of Walton's disqualification, and Akal terminated Walton's employment.

In her Third Amended Complaint, Walton alleged that the USMS and various individuals and federal agencies terminated her employment in violation of the Rehabilitation Act, 29 U.S.C. § 701-796l, and, in the alternative, the Administrative Procedure Act, 5 U.S.C. § 701-706. The district court held that the USMS was a proper defendant under the Rehabilitation Act[2] and granted the USMS's motion for summary judgment on Walton's Rehabilitation Act claims, finding that Walton did not make a prima facie showing that she was disabled under the meaning of the Acts. Walton filed a timely appeal of the district court's decision.

II. Standard of Review

We review a district court's grant of summary judgment on a Rehabilitation Act claim de novo. *Coons*

v. Sec'y of the U.S. Dep't of the Treasury, 383 F.3d 879, 884 (9th Cir. 2004). "Viewing the evidence in the light most favorable to the nonmoving party, and drawing all reasonable inferences in her favor, we must determine whether the district court correctly applied the relevant substantive law and whether there are any genuine issues of material fact." *Id.* (quoting *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1187 (9th Cir. 2001)).

III. Discussion

To state a prima facie case under the Rehabilitation Act, a plaintiff must demonstrate that (1) she is a person with a disability, (2) who is otherwise qualified for employment, and (3) suffered discrimination because of her disability. *See Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1058 (9th Cir. 2005). The Americans with Disabilities Act, whose standards of substantive liability are incorporated in the Rehabilitation Act, defines "disability" as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (B) a record of such an impairment, or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(2); *Coons*, 383 F.3d at 884.

A. "Regarded As" Disabled

Walton does not allege that she is actually disabled; rather she alleges that she is a person with a disability within the meaning of the Acts because she was "regarded as" disabled. The Equal Employment Opportunity Commission's regulations state that an individual who is "regarded as" disabled:

(1)Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section[3] but is treated by a covered entity as having a substantially limiting impairment. 29 C.F.R. § 1630.2(*l*). Assuming without deciding that the EEOC regulations are valid, the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999), held that an employee may be "regarded as" disabled in one of two ways:

(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or

(2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. 527 U.S. at 489. The Supreme Court in *Sutton* further instructed that: "In both cases, it is necessary that a covered entity entertain misperceptions about the individual -- it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting." *Id.*

Following *Sutton*, this court requires that a plaintiff alleging a "regarded as" claim provide evidence of the

employer's "misperception," or subjective belief that the plaintiff is substantially impaired. *See, e.g., EEOC v. UPS*, 306 F.3d 794, 805 (9th Cir. 2002). In *EEOC*, we noted the importance of the "employer's motivation[s]" and held that the district court "made no *finding* about what UPS actually regarded as the restriction, real or unreal, in claimants' vision that substantially limits all of them in the major life activity of seeing." *Id.* (emphasis in original). Similarly, in *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 119 S. Ct. 2133, 144 L. Ed. 2d 484 (1999), the Supreme Court emphasized that a plaintiff must show that her employer regards her as substantially limited in a major life activity and not just unable to meet a particular job performance standard. *See id.* at 524.

A plaintiff need not make this showing -- that an employer subjectively believed that the plaintiff is substantially limited in a major life activity as the result of an impairment -- through direct evidence. *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1229 n.6 (9th Cir. 2001). However, because "a person cannot be *regarded* as disabled unless the deficiency that the person is regarded as having is a *disability* ," an employee who is only able to show that her employer regarded her as impaired must also provide evidence that the imputed impairment is objectively substantially limiting. *See EEOC*, 306 F.3d at 801 (emphasis in original). *See also Thompson v. Holy Family*, 121 F.3d 537, 540-41 (9th Cir. 1997) (defendant's belief that plaintiff was incapable of lifting 25 pounds is insufficient evidence that the defendant regarded plaintiff as disabled because the court "noted previously that a 25-pound restriction does not amount to a substantial limitation on the ability to lift").

Accordingly, we hold that in order to state a "regarded as" claim a plaintiff must establish that the employer believes that the plaintiff has some impairment, and provide evidence that the employer subjectively believes that the plaintiff is substantially limited in a major life activity. If the plaintiff does not have direct evidence of the employer's subjective belief that the plaintiff is substantially limited in a major life activity, the plaintiff must further provide evidence that the impairment imputed to the plaintiff is, objectively, a substantially limiting impairment. *See Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 798 (9th Cir. 2001) (affirming district court's judgment for defendant on plaintiff's "regarded as" claim because "there is no specific evidence that [employer] viewed her as substantially limited" and "[employee's] restrictions did not rise to the level of substantial limitation").

Walton alleges that she was regarded as substantially limited in the major life activities of (1) hearing, (2) working, and (3) localizing sound. Walton fails to raise a genuine issue of material fact that the USMS regarded her as disabled with respect to any of these activities.

1. *The Major Life Activity of Hearing*

According to EEOC regulations, hearing is a major life activity. 29 C.F.R. § 1630.2(i). The district court found that Walton did not raise a genuine issue of material fact that the USMS subjectively believed her hearing to be substantially limited, or that the inability to localize sound is an objective and substantial limitation on the major life activity of hearing. We agree.

a. Subjective Belief of Substantial Limitation

A substantial limitation on the major life activity of hearing is a severe restriction on the use of an individual's hearing compared to how unimpaired individuals normally use their hearing in daily life. *See Toyota Motor Mfg., Ky, Inc. v. Williams*, 534 U.S. 184, 200-01, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002) (stating the rule in terms of the major life activity of performing manual tasks); *EEOC*, 306 F.3d at 802 (same regarding the major life activity of seeing). Walton primarily argues that Dr. Chelton's report disqualifying her from employment as a CSO raises a genuine issue of material fact that the USMS believed she was substantially limited in the major life activity of hearing.

Walton's argument that her disqualification under the USMS's hearing standards is itself sufficient evidence that the USMS regarded her as disabled in a major life activity fails. In *EEOC*, we held that an allegation that an employer which requires its employees to meet certain vision standards does not establish a claim that the employer regards one who fails to meet the vision requirement as being substantially limited in the major life activities of working or seeing. 306 F.3d at 804 (citing *Sutton*, 527 U.S. at 490). Standing alone, Walton's failure to meet the USMS hearing standards does not raise a genuine issue of material fact that the USMS regarded her as disabled.

The statements in Dr. Chelton's report are also insufficient to constitute direct evidence of the USMS's subjective belief that Walton was substantially limited in the major life activity of hearing. Construed in the light most favorable to Walton, Dr. Chelton's

statements that: "you are unable to localize sound," "you have only one functioning ear," and "[y]our inability to [localize sound] poses a significant risk to the health and safety of yourself, other law enforcement officers and the public," is evidence of his belief that Walton could not safely perform her job. However, because Dr. Chelton's letter does not express an opinion on whether the USMS regarded Walton's hearing impairment as substantially limiting in a major life activity, it does not follow that the USMS regarded her as disabled. *See EEOC*, 306 F.3d at 806 (citing *Thompson*, 121 F.3d at 541).

b. Objective Substantial Limitations

Since Walton failed to provide direct evidence that USMS regarded her as substantially limited in a major life activity because of her hearing impairment, Walton must show that the inability to localize sound is an impairment that substantially limits the major life activity of hearing. *Thompson*, 121 F.3d at 541 ("[a]s with real impairments, . . . a perceived impairment must be substantially limiting and significant"). Attempting to make this showing, Walton relies on a report by her expert, Dr. Robert Sweetow, and on a report by Dr. Lynn Cook, a consulting audiologist in the development of the USMS hearing standards.

Walton argues that the following paragraph in Dr. Sweetow's expert report raises a genuine issue of material fact that the inability to localize sound is an impairment that substantially limits the major life activity of hearing:

Dr. Chelton states the plaintiff is "unable to localize the direction of sound." The ability to localize sound is ". . . essential to the condition or manner under which an individuals [sic] can . . ." use the sense of hearing. Thus being able to localize sound severely/ significantly restricts one's hearing as compared to how unimpaired people normally hear in everyday life. (Ellipses in original). This paragraph is insufficient to raise a genuine issue of material fact. In this circuit, "[e]xpert opinion is admissible and may defeat summary judgment if it appears the affiant is competent to give an expert opinion and the factual basis for the opinion is stated in the affidavit, even though the underlying factual details and reasoning upon which the opinion is based are not." *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1318 (9th Cir. 1985) (per curiam). Dr. Sweetow does not state a factual basis for his opinion; the conclusion appears to be drawn from the second sentence, but the second sentence references no facts and instead contains an unattributed quote. Dr. Sweetow's conclusory report fails to raise a genuine issue of material fact that the inability to localize sound is an impairment that substantially limits the major life activity of hearing. *See also Broussard v. Univ. of Cal., at Berkeley*, 192 F.3d 1252, 1258-59 (9th Cir. 1999) (finding report by plaintiff's vocational rehabilitation specialist that "did not compare the jobs [plaintiff] could do before and after the onset of her [disability]," and did not identify the "time periods he was analyzing" to be "the type of conclusory allegation which this court found insufficient to withstand the motion for summary judgment in *Thompson*").

Walton's only other evidence that the inability to localize sound is substantially limiting is a draft report

prepared by Dr. Lynn Cook for the United States Immigration and Naturalization Service. In a section titled "Why is Auditory Localization Important?" Cook states that auditory localization is necessary for the performance of certain activities. Viewed in the light most favorable to Walton, Dr. Cook's report indicates that, unlike a mere difficulty with localizing sound, a complete inability to localize sound may severely impact how hearing is used in daily life by precluding activities such as locating other people, pinpointing the direction of a sound of interest, and identifying if footsteps are retreating or approaching.

However, Dr. Cook's report also discusses compensatory measures, which "must be taken into account in judging whether an individual possesses a disability." *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565, 119 S. Ct. 2162, 144 L. Ed. 2d 518 (1999)(citing *Sutton*, 527 U.S. at 482). In stating that "visual localization is generally just as accurate" as auditory localization, Dr. Cook's report opines that the compensatory measure of "visual localization" mitigates the effects of an inability to localize sound. Since there is "no principled basis for distinguishing between [mitigating] measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems," *Albertson's*, 527 U.S. at 565-66, we view the inability to localize sound as being mitigated by visual localization.

Dr. Cook's report states the only disadvantages of relying on visual localization apparent from the record and Walton does not provide any further evidence on this issue. Dr. Cook states that mitigating the effects of

the inability to localize sound with visual localization has only minor drawbacks: it "is not nearly as efficient (quick) as auditory localization" and it "assumes that the source of the sound can be visualized, which is often not possible in low-light environments, when the source is visually obscured by other objects, or when the source is not visually apparent (as in the bank of radios above)." Walton relies solely on Dr. Cook's report, and presents no contrary evidence in the record that auditory localization, as mitigated by visual localization, is an objectively severe restriction on the use of an individual's hearing compared to how unimpaired individuals normally use their hearing in daily life. On this basis, no reasonable trier of fact could find that the inability to localize sound, as characterized here, is in fact substantially limiting.

Walton has not raised a genuine issue of material fact that the impairment imputed to her is in fact substantially limiting, and we therefore affirm the district court's finding that Walton was not regarded as disabled with respect to the major life activity of hearing.

2. *Working*

EEOC regulations specify that a person is "substantially limited" in the major life activity of working if she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). An allegation that the employer regards the impairment as precluding the employee from a single, particular position is insufficient to

support a claim that the employer regards the employee as having a substantially limiting impairment. *See Murphy*, 527 U.S. at 523.

Walton raises insufficient evidence to support her argument that the USMS regarded her as substantially limited in the major life activity of working. In *Thornton*, we held that a plaintiff alleging substantial limitation in the major life activity of working "must present specific evidence about relevant labor markets to defeat summary judgment" and "identify what requirements posed by the class of . . . jobs . . . were problematic in light of the limitations imposed on her." 261 F.3d at 795-96 (citation omitted) (ellipses in original). Walton does not meet the evidentiary standard set out in *Thornton* because she relies solely on Dr. Chelton's letter, Dr. Sweetow's expert report and Dr. Cook's report on auditory localization, none of which expresses any opinion about relevant labor markets or Walton's particular training, knowledge, skills or abilities. Accordingly, we affirm the district court's holding that Walton failed to raise a genuine issue of material fact that she was substantially limited in the major life activity of working.

3. *Localizing Sound*

Walton further alleges that the USMS regarded her as disabled in the major life activity of localizing sound. We decline to consider whether localizing sound could be an additional major life activity because Walton failed to raise this argument before the district court. *See Head v. Glacier Nw., Inc.*, 413 F.3d 1053, 1060 n.19 (9th Cir. 2005).

B. Record of Impairment

Walton also alleges that she is disabled on the basis of having a record of impairment as defined in 42 U.S.C. § 12102(2)(B). Implementing regulations explain that having a "record" of a disability means either having a history of, or having been misclassified as having, a substantially limiting impairment. 29 C.F.R. § 1630.2(k). *See also Coons*, 383 F.3d at 886 (doctor's letter describing stress-related physical ailments did not constitute such a record because none of the treated impairments substantially limited any major life activity); *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1169 (1st Cir. 2002)(plaintiff's long and documented record of alcoholism did not establish a disability because the record did not show that plaintiff's alcoholism "significantly interfered with a major life activity").

Walton argues that Dr. Chelton's two reports regarding her USMS test results constitute a medical record of having only one functioning ear and being unable to localize sound. For the reasons stated above, Walton has failed to raise a genuine issue of material fact that this impairment is a substantially limiting impairment; thus, any record of this impairment would not meet the requirements of 29 C.F.R. § 1630.2(k).

C. Remaining Claims

Because Walton is not a person with a disability as defined by the Acts, Walton's claims that the USMS discriminated against her based on disability fail as a matter of law. *See Coons*, 383 F.3d at 886. We therefore affirm the district court's decision to grant summary

judgment in favor of the USMS on Walton's remaining claims.

IV. Conclusion

We conclude that Walton cannot demonstrate she is disabled within the meaning of the Acts, and we affirm the district court's grant of summary judgment to the USMS.

AFFIRMED.

Footnotes

[1]Because "[t]he standards used to determine whether an act of discrimination violated the Rehabilitation Act are the same standards applied under the Americans with Disabilities Act," we refer to them jointly as "the Acts." *Coons v. Sec'y of the U.S. Dep't of the Treasury*, 383 F.3d 879, 884 (9th Cir. 2004).

[2]The district court's decision that the USMS is a proper defendant in this case is not before this court and we express no opinion on the issue. 3The regulations define "Physical or mental impairment" as:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.29 C.F.R. § 1630.2(h).

No. 05-17308

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NAOMI WALTON,
Plaintiff-Appellant,

v.

U.S. MARSHALS SERVICE; MARC A. FARMER, Chief, Judicial Protective Services-Judicial Security Division; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; BENIGNO G. REYNA, Director, United States Marshals Service; ALBERTO R. GONZALES, Attorney General, Defendants-Appellees.

November 16, 2006, Argued and Submitted, Portland, Oregon

June 26, 2007, Amended

COUNSEL: Edith J. Benay, San Francisco, California, for the plaintiff-appellant.

Eric Fleisig-Greene, United States Department of Justice, Washington, DC, for the defendant-appellee.

JUDGES: Before: Alfred T. Goodwin, Raymond C. Fisher, and Milan D. Smith, Jr., Circuit Judges.

OPINION BY: Milan D. Smith, Jr.

OPINION

AMENDED OPINION

SMITH, Circuit Judge:

Naomi Walton sued the U.S. Marshals Service ("USMS") under the Rehabilitation Act of 1973 alleging that the USMS unlawfully discharged her because of her hearing impairment. She appeals from the district court's grant of summary judgment in favor of the USMS, arguing that the district court erred in ruling that she failed to demonstrate a genuine issue of material fact concerning whether she was disabled within the meaning of the Acts.[1] We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I. Background

Walton was employed by Akal Security, Inc. ("Akal") as a Court Security Officer ("CSO") at the United States District Court for the Northern District of California. Akal is a private contractor that provides CSOs at federal courthouses within the Ninth Circuit by contract with the USMS. The contract requires that Akal employees for CSO positions meet certain USMS physical requirements. Based on the USMS's determination that Walton did not meet the USMS's audiological standards, the USMS medically disqualified her from employment as a CSO and Akal terminated her employment.

In its agreement with Akal, the USMS requires CSOs to undergo annual physical examinations. The USMS's current CSO audiological standards were developed

based upon a study by Dr. Richard Miller, Director of Law Enforcement Medical Programs for the Office of Federal Occupational Health. Dr. Miller's study identified twenty-nine job functions essential to the CSO position, one of which is the ability to determine the location and source of sound. The Judicial Conference of the United States adopted the conclusions of Dr. Miller's study and directed the USMS to implement a number of changes to the CSO medical standards.

In November 2001, as a part of an annual physical examination required by her employment contract, Walton underwent audiological testing by an Akal-designated physician. Dr. Louis Chelton, a medical review officer in the Office of Federal Occupational Health, reviewed the results of Walton's test in order to assess her compliance with USMS standards. Based on Walton's test results, Dr. Chelton noted that Walton has a disparity between her two ears' ability to detect sound, and that this disparity impacts her ability to localize sound.

Consistent with USMS policy, Walton was given an opportunity to provide further test results or other information to support her qualification before the USMS made a final recommendation concerning her medical eligibility. Walton took this opportunity and underwent a second hearing test. Dr. Chelton reviewed the additional results and reported on a "Medical Review Form" that Walton was "[n]ot medically qualified to perform the essential functions of the job." The form reads, in relevant part:

The following medical condition(s) poses a significant risk to the health and safety of yourself and/or others in the performance of essential job functions. Medical follow-up, if requested, and any reduction of duties are listed below. Send medical information to your employer.

You have a significant hearing impairment according to the results of the tests provided by you from Gould Medical Foundation. According to the test results you have only one functioning ear. With only one functioning ear, you are unable to localize the direction of sound, an essential job function. Hearing aids may malfunction or become dislodged in critical situations. Your job requires the ability to detect where sound is coming from. Your inability to do so poses a significant risk to the health and safety of yourself, other law enforcement officers, and the public.The USMS then notified Akal of Walton's disqualification, and Akal terminated Walton's employment.

In her Third Amended Complaint, Walton alleged that the USMS and various individuals and federal agencies terminated her employment in violation of the Rehabilitation Act, 29 U.S.C. § 701-796l, and, in the alternative, the Administrative Procedure Act, 5 U.S.C. § 701-706. The district court held that the USMS was a proper defendant under the Rehabilitation Act[2] and granted the USMS's motion for summary judgment on Walton's Rehabilitation Act claims, finding that Walton did not make a prima facie showing that she was disabled under the meaning of the Acts. Walton filed a timely appeal of the district court's decision.

II. Standard of Review

We review a district court's grant of summary judgment on a Rehabilitation Act claim de novo. *Coons v. Sec'y of the U.S. Dep't of the Treasury*, 383 F.3d 879, 884 (9th Cir. 2004). "Viewing the evidence in the light most favorable to the nonmoving party, and drawing all reasonable inferences in her favor, we must determine whether the district court correctly applied the relevant substantive law and whether there are any genuine issues of material fact." *Id.* (quoting *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1187 (9th Cir. 2001)).

III. Discussion

To state a prima facie case under the Rehabilitation Act, a plaintiff must demonstrate that (1) she is a person with a disability, (2) who is otherwise qualified for employment, and (3) suffered discrimination because of her disability. *See Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1058 (9th Cir. 2005). The Americans with Disabilities Act, whose standards of substantive liability are incorporated in the Rehabilitation Act, defines "disability" as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (B) a record of such an impairment, or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(2); *Coons*, 383 F.3d at 884.

A. "Regarded As" Disabled

Walton does not allege that she is actually disabled; rather she alleges that she is a person with a disability within the meaning of the Acts because she was "regarded as" disabled. The Equal Employment

Opportunity Commission's regulations state that an individual who is "regarded as" disabled:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

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(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section[3] but is treated by a covered entity as having a substantially limiting impairment.29 C.F.R. § 1630.2(l). Assuming without deciding that the EEOC regulations are valid, the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999), held that an employee may be "regarded as" disabled in one of two ways:

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(2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.527 U.S. at 489. The Supreme Court in *Sutton* further instructed that: "In both cases, it is necessary that a covered entity entertain misperceptions about the individual --it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially

limiting impairment when, in fact, the impairment is not so limiting." *Id.*

Following *Sutton*, this court requires that a plaintiff alleging a "regarded as" claim provide evidence of the employer's "misperception," or subjective belief that the plaintiff is substantially impaired. *See, e.g., EEOC v. United Parcel Service, Inc.*, 306 F.3d 794, 805 (9th Cir. 2002). In *EEOC*, we noted the importance of the "employer's motivation[s]" and held that the district court "made no *finding* about what UPS actually regarded as the restriction, real or unreal, in claimants' vision that substantially limits all of them in the major life activity of seeing." *Id.* (emphasis in original). Similarly, in *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 119 S. Ct. 2133, 144 L. Ed. 2d 484 (1999), the Supreme Court emphasized that a plaintiff must show that her employer regards her as substantially limited in a major life activity and not just unable to meet a particular job performance standard. *See id.* at 524.

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Accordingly, we hold that in order to state a "regarded as" claim a plaintiff must establish that the employer believes that the plaintiff has some impairment, and provide evidence that the employer subjectively believes that the plaintiff is substantially limited in a major life activity. If the plaintiff does not have direct evidence of the employer's subjective belief that the plaintiff is substantially limited in a major life activity, the plaintiff must further provide evidence that the impairment imputed to the plaintiff is, objectively, a substantially limiting impairment. *See Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 798 (9th Cir. 2001) (affirming district court's judgment for defendant on plaintiff's "regarded as" claim because "there is no specific evidence that [employer] viewed her as substantially limited" and "[employee's] restrictions did not rise to the level of substantial limitation").

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1. *The Major Life Activity of Hearing*

According to EEOC regulations, hearing is a major life activity. 29 C.F.R. § 1630.2(i). The district court found

that Walton did not raise a genuine issue of material fact that the USMS subjectively believed her hearing to be substantially limited, or that the inability to localize sound is an objective and substantial limitation on the major life activity of hearing. We agree.

a. Subjective Belief of Substantial Limitation

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Since Walton failed to provide direct evidence that USMS regarded her as substantially limited in a major life activity because of her hearing impairment, Walton must show that the inability to localize sound is an impairment that substantially limits the major life activity of hearing. *Thompson*, 121 F.3d at 541 ("[a]s with real impairments, . . . a perceived impairment must be substantially limiting and significant"). Attempting to make this showing, Walton relies on a report by her expert, Dr. Robert Sweetow, and on a report by Dr. Lynn Cook, a consulting audiologist in the development of the USMS hearing standards.

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found insufficient to withstand the motion for summary judgment in *Thompson*").

Walton's only other evidence that the inability to localize sound is substantially limiting is a draft report prepared by Dr. Lynn Cook for the United States Immigration and Naturalization Service. In a section titled "Why is Auditory Localization Important?" Cook states that auditory localization is necessary for the performance of certain activities. Viewed in the light most favorable to Walton, Dr. Cook's report indicates that, unlike a mere difficulty with localizing sound, a complete inability to localize sound may severely impact how hearing is used in daily life by precluding activities such as locating other people, pinpointing the direction of a sound of interest, and identifying if footsteps are retreating or approaching.

However, Dr. Cook's report also discusses compensatory measures, which "must be taken into account in judging whether an individual possesses a disability." *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565, 119 S. Ct. 2162, 144 L. Ed. 2d 518 (1999) (citing *Sutton*, 527 U.S. at 482). In stating that "visual localization is generally just as accurate" as auditory localization, Dr. Cook's report opines that the compensatory measure of "visual localization" mitigates the effects of an inability to localize sound. Since there is "no principled basis for distinguishing between [mitigating] measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems," *Albertson's*, 527 U.S. at 565-66, we view the inability to localize sound as being mitigated by visual localization.

Dr. Cook's report states the only disadvantages of relying on visual localization apparent from the record and Walton does not provide any further evidence on this issue. Dr. Cook states that mitigating the effects of the inability to localize sound with visual localization has only minor drawbacks: it "is not nearly as efficient (quick) as auditory localization" and it "assumes that the source of the sound can be visualized, which is often not possible in low-light environments, when the source is visually obscured by other objects, or when the source is not visually apparent (as in the bank of radios above)." Walton relies solely on Dr. Cook's report, and presents no contrary evidence in the record that auditory localization, as mitigated by visual localization, is an objectively severe restriction on the use of an individual's hearing compared to how unimpaired individuals normally use their hearing in daily life. On this basis, no reasonable trier of fact could find that the inability to localize sound, as characterized here, is in fact substantially limiting.

Walton has not raised a genuine issue of material fact that the impairment imputed to her is in fact substantially limiting, and we therefore affirm the district court's finding that Walton was not regarded as disabled with respect to the major life activity of hearing.

2. *Working*

EEOC regulations specify that a person is "substantially limited" in the major life activity of working if she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person

having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). An allegation that the employer regards the impairment as precluding the employee from a single, particular position is insufficient to support a claim that the employer regards the employee as having a substantially limiting impairment. *See Murphy*, 527 U.S. at 523.

Walton raises insufficient evidence to support her argument that the USMS regarded her as substantially limited in the major life activity of working. In *Thornton*, we held that a plaintiff alleging substantial limitation in the major life activity of working "must present specific evidence about relevant labor markets to defeat summary judgment" and "identify what requirements posed by the class of . . . jobs . . . were problematic in light of the limitations imposed on her." 261 F.3d at 795-96 (citation omitted) (ellipses in original). Walton does not meet the evidentiary standard set out in *Thornton* because she relies solely on Dr. Chelton's letter, Dr. Sweetow's expert report and Dr. Cook's report on auditory localization, none of which expresses any opinion about relevant labor markets or Walton's particular training, knowledge, skills or abilities. Accordingly, we affirm the district court's holding that Walton failed to raise a genuine issue of material fact that she was substantially limited in the major life activity of working.

3. *Localizing Sound*

Walton also alleges that the USMS regarded her as disabled because it regarded her as substantially limited in the activity of localizing sound.[4] In order to show that such a limitation is a disability within the

meaning of the Acts, Walton must provide evidence that the ability to localize sound qualifies as a major life activity. *See Coons*, 383 F.3d at 885. We find that she has not.

"'Major life activities' . . . refers to those activities that are of central importance to daily life." *Williams*, 534 U.S. at 197; *see also Fraser v. Goodale*, 342 F.3d 1032, 1039 (9th Cir. 2003) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 638, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998)). To determine whether a proposed activity is a major life activity, we begin with the illustrative list in the implementing regulations which describes major life activities as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Bragdon*, 524 U.S. at 638 (quoting 45 C.F.R. § 84.3(j)(2)(ii) (1997) and 28 C.F.R. § 41.31(b)(2) (1997)). Because "[t]he plain meaning of the word 'major' denotes comparative importance," we then compare the proposed activity with the major life activities enumerated in the regulations, noting that "the touchstone for determining an activity's inclusion under the statutory rubric is its significance." *Id.* (quoting *Abbott v. Bragdon*, 107 F.3d 934, 939-40 (1st Cir. 1997)) (internal quotation marks omitted).

The "comparative importance" standard requires that a proposed activity must be of comparable significance as an enumerated major life activity in order to qualify as a major life activity. For example, in *Bragdon*, the Supreme Court held that "reproduction [is] a major life activity, since reproduction could not be regarded as any less important than working and learning." 524 U.S. at 639. *See also Sinkler v. Midwest Prop. Mgmt. Ltd.*

P'ship, 209 F.3d 678, 684-85 (7th Cir. 2000)("getting to and from work" is not of equal significance to enumerated major life activities and thus is not a major life activity; "rather . . . [it] is a sub-species of the activity of 'working' or of 'driving'").

Walton provides no authority for her argument that the ability to localize sound is a major life activity. Instead, she claims that under our decision in *Head v. Glacier Northwest Inc.*, 413 F.3d 1053 (9th Cir. 2005), her experts' reports discussing the impact of the inability to localize sound on an individual's hearing should be considered evidence of comparative importance. Walton misreads *Head*. *Head* does not stand for the proposition that a proposed activity is a major life activity simply because it is "in some instances" necessary to the performance of an established major life activity. Such an expansive reading of "major life activity" would collapse into one the final two of the following three inquiries to determine the existence of a disability under our case law: "(1) we determine whether [the alleged impairment] is a physical impairment, (2) we identify the life activity on which [plaintiff] relies, and we determine whether this activity is a major life activity, and (3) we determine whether the impairment substantially limits the major life activity." *Fraser*, 342 F.3d at 1038. As the Second Circuit explained in *Reeves v. Johnson Controls World Services, Inc.*:

An ADA plaintiff could considerably lessen the burden of making an individualized showing of a substantial limitation were he able to define the major life activity as narrowly as possible, with an eye toward conforming the definition to the particular facts of his own case. . . . Narrowing and diluting the definition of a major life

activity, which in turn might lessen the plaintiff's burden of proving a substantial limitation, would undermine the role of the statute's "substantial limit[ation]" inquiry in ensuring that only impairments of some significance are protected by the ADA.140 F.3d 144, 152 (2d Cir. 1988). Thus, consistent with controlling precedent, our observation in *Head* that a proposed activity may be important because it "is necessary in many instances to perform" an enumerated major life activity does not obviate the need to meet the ultimate standard that a proposed activity must be "of comparative importance, and . . . central to most people's daily lives" in order to be considered a major life activity. *Head*, 413 F.3d at 1062.

Under the proper standard, the evidence in the record is insufficient to support Walton's assertion that the ability to localize sound is itself a major life activity. For the reasons discussed in the preceding section, we do not give any evidentiary weight to Dr. Sweetow's report. Walton's only other expert report is that authored by Dr. Cook. In the light most favorable to Walton, Dr. Cook's report indicates that a complete inability to localize sound may severely impact how hearing is used in daily life. Dr. Cook's report does not, however, suggest that the ability to localize sound is comparable to "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" or that the ability to localize sound is itself central to an individual's life. Thus, on this record, we are unable to conclude that auditory localization is of comparative importance to the enumerated major life activities, and Walton therefore cannot sustain a claim that she was regarded as disabled because of her inability to localize sound.

B. Record of Impairment

Walton also alleges that she is disabled on the basis of having a record of impairment as defined in 42 U.S.C. § 12102(2)(B). Implementing regulations explain that having a "record" of a disability means either having a history of, or having been misclassified as having, a substantially limiting impairment. 29 C.F.R. § 1630.2(k). *See also Coons*, 383 F.3d at 886 (doctor's letter describing stress-related physical ailments did not constitute such a record because none of the treated impairments substantially limited any major life activity); *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1169 (1st Cir. 2002) (plaintiff's long and documented record of alcoholism did not establish a disability because the record did not show that plaintiff's alcoholism "significantly interfered with a major life activity").

Walton argues that Dr. Chelton's two reports regarding her USMS test results constitute a medical record of having only one functioning ear and being unable to localize sound. For the reasons stated above, Walton has failed to raise a genuine issue of material fact that this impairment is a substantially limiting impairment; thus, any record of this impairment would not meet the requirements of 29 C.F.R. § 1630.2(k).

C. Remaining Claims

Because Walton is not a person with a disability as defined by the Acts, Walton's claims that the USMS discriminated against her based on disability fail as a matter of law. *See Coons*, 383 F.3d at 886. We therefore affirm the district court's decision to grant summary

judgment in favor of the USMS on Walton's remaining claims.

IV. Conclusion

We conclude that Walton cannot demonstrate she is disabled within the meaning of the Acts, and we affirm the district court's grant of summary judgment to the USMS.

AFFIRMED.

Footnote

1Because "[t]he standards used to determine whether an act of discrimination violated the Rehabilitation Act are the same standards applied under the Americans with Disabilities Act," we refer to them jointly as "the Acts." *Coons v. Sec'y of the U.S. Dep't of the Treasury*, 383 F.3d 879, 884 (9th Cir. 2004).

2The district court's decision that the USMS is a proper defendant in this case is not before this court and we express no opinion on the issue.

3The regulations define "Physical or mental impairment" as:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.29 C.F.R. § 1630.2(h)

4Walton raised this argument in a supplemental brief filed with the district court after the close of briefing on USMS's motion for summary judgment. The district court indicated that it received and considered Walton's supplemental brief, but its order did not address Walton's additional argument. We consider it here. We observe that we may affirm the district court's grant of summary judgment on any ground supported by the record. *Miranda v. City of Cornelius*, 429 F.3d 858, 860 n.1 (9th Cir. 2005).

No. C 03-01460SI.
United States District Court,
N.D. California.

Naomi WALTON, Plaintiff,
v.
U.S. MARSHALS SERVICE, et al., Defendants.

Sept. 13, 2005.

Edith J. Benay, San Francisco, CA, for Plaintiff. Abraham A. Simmons, U.S. Attorney's Office, San Francisco, CA, for Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ILLSTON, J.

Defendants have filed a motion for summary judgment. Having carefully considered the argument of counseland the papers submitted on the motion,[1] the Court hereby GRANTS defendants' motion for summary judgment.

BACKGROUND

Plaintiff was employed for fourteen years as a court security officer ("CSO") by Akal Security. CSOs guard courthouse entrances, screen visitors, inspect packages and mail, and provide a security presence in courtrooms. Akal has been contracted by the United States Marshal Service ("USMS") to provide security at federal courthouses in the Ninth Circuit. CSOs must

meet physical requirements established in the contract between Akal and USMS through yearly physical examinations.

Until 2000, CSOs were evaluated for medical conditions using a federal Civil Service form developed in the 1960's. In 1999, the United States Judicial Conference, which oversees the judicial security program, requested a job-task analysis of the CSO position. In response to that request, Dr. Richard Miller, Director of Law Enforçement Medical Programs for the Office of Federal Occupational Health, produced a report recommending changes to the physical requirements for CSOs. Dr. Miller's report was largely adopted by the Judicial Conference, which directed the USMS to implement a number of changes to CSO medical standards. Some of these changes involved minimum hearing standards which must be met without the use of hearing aids. However, the Judicial Conference allowed CSOs who pass the hearing test without hearing aids to wear hearing aids on the job.

In November 2001, plaintiff underwent audiological testing. On January 17, 2002, Dr. Chelton, a medical review officer for the Office of Federal Occupational Health, reviewed plaintiff's medical submission and found that it did not meet the required standard. In response, plaintiff performed another audiogram test on April 5, 2002. Dr. Chelton reviewed the additional results on May 31, 2002 and found that plaintiff has "a significant hearing impairment according to the results of the tests provided." Specifically, plaintiff tested to have a disparity between her right and left ear in her ability to detect sound. This disparity would impact her ability to localize sound. Localizing sound is the "ability

to identify the direction and distance of a sound source outside the head." Benay Decl, Ex. Z at USA000571. Based on the test results, Dr. Chelton concluded that plaintiff was not qualified to perform the job of CSO. As a result, USMS disqualified plaintiff from her position as a CSO. Due to her disqualification, plaintiff's employment with Akal was terminated.

Plaintiff brought suit in this Court, alleging that she has suffered and continues to suffer irreparable harm after being terminated. In her Third Amended Complaint, plaintiff has sued various individuals and federal agencies under the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., and the Administrative Procedures Act, 5 U.S.C. § 701 et seq. The Court denied plaintiff's motion for summary judgment on January 24, 2005. Defendants now bring their motion for summary judgment.

LEGAL STANDARD

I. Summary judgment

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party, however, has no burden to negate or disprove matters on which the non-moving party will have the burden of proof at trial. The moving

party need only point out to the Court that there is an absence of evidence to support the non-moving party's case. *See id.* at 325.

The burden then shifts to the non-moving party to "designate 'specific facts showing that there is a genuine issue for trial." ' *Id.* at 324 (quoting Fed.R.Civ.P. 56(e)). To carry this burden, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). "The mere existence of a scintilla of evidence ... will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In deciding a motion for summary judgment, the evidence is viewed in the light most favorable to the non-moving party, and all justifiable inferences are to be drawn in its favor. *Id.* at 255. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge [when she] is ruling on a motion for summary judgment." *Id.*

II. Rehabilitation Act

To state a prima facie case under the Rehabilitation Act, plaintiff must demonstrate that (1) she is a person with a disability, (2) who is otherwise qualified for employment, and (3) suffered discrimination because of her disability. *See Lucero v. Hart.*, 915 F.2d 1367, 1371 (9th Cir.1990); *Reynolds v. Brock*, 815 F.2d 571, 573-74

(9th Cir.1987). Once a plaintiff has made out a prima facie case, the burden then shifts to the defendant to offer a legitimate, nondiscriminatory reason for its adverse employment action. Once the defendant articulates such a reason, the plaintiff must then offer evidence to show that the defendant's proffered reason is a pretext for discrimination or retaliation for protected activity. *See Lucero,* 915 F.2d at 1371.

DISCUSSION

I. Proper defendants

Under the Rehabilitation Act, the proper defendant is the head of the government agency against which discrimination is alleged. *See Barsen v. Department of the Interior,* 896 F.2d 422, 423 (9th Cir.1990); *Dean v. United States,* 484 F.Supp. 888, 898-890 (D.C.N.D.1980). Defendants argue that the only proper defendant for plaintiff's Rehabilitation Act claim is Attorney General Alberto Gonzales, as the head of the Department of Justice. Plaintiff, in her complaint, does not clearly designate which causes of action are brought against each defendant. Therefore, the Court GRANTS defendants' motion for summary judgment to all defendants except the Attorney General for plaintiff's Rehabilitation Act claim.

Defendants also assert that Marc Farmer, the Chief of the Judicial Protective Services of the United States Marshals Service, is the only proper defendant under plaintiff's Administrative Procedures Act claim. Actions under 5 U.S.C. § 703 may be brought against "the United States, the agency by its officialtitle, or the appropriate officer." Defendants argue that Farmer

made the final agency decision involved in plaintiff's APA claim by approving the decision that plaintiff was not qualified to continue her employment as a CSO. Plaintiff appears to argue that Farmer, the United States Marshals Service, and the United States Department of Health & Human Services were all involved in plaintiff's termination.

Courts have recognized that "when an instrumentality of the United States is the real defendant," then the plaintiff may name as defendant "the United States, the agency by its officialtitle, or the appropriate officer." *Jones v. United States Drug Enforcement Agency*, 801 F.Supp. 15, 19 (M.D.Tenn.1992). Additionally, "[t]he outcome of the case should not turn on the plaintiff's choice." *Id.* Therefore, the Court will allow plaintiff to bring her APA claim against Farmer and the United States Marshals Service, as both were directly responsible for the determination to terminate her employment. However, the Court GRANTS defendants' motion with respect to all defendants aside from Farmer and the USMS for plaintiff's APA claim. Given the Court's holding that Attorney General Alberto Gonzales is the only proper defendant for plaintiff's Rehabilitation Act claim and that Farmer and the USMS are the proper defendants for plaintiff's APA claim, the Court now turns to defendants' arguments regarding the merits of those claims.

II. Rehabilitation Act

A. Is plaintiff "disabled" as defined by the Rehabilitation Act?

The Americans with Disabilities Act ("ADA"), whose standards of substantive liability are incorporated in the Rehabilitation Act, defines "disability" as: 1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; 2) a record of such an impairment; or 3) being regarded as having such an impairment. 42 U.S.C. § 12102(2); *Coons v. Secretary of the U.S. Dept. of the Treasury*, 383 F.3d 879, 884 (9th Cir.2004).

1. Physical impairment

Defendants request that the Court grant summary judgment with respect to plaintiff's claim that she is actually disabled because plaintiff has not presented any evidence that her hearing impairment substantially limits any major life activity in her daily life. Plaintiff acknowledges that she is not actually disabled as defined under the Rehabilitation Act. *See* Pl.'s Opp'n at 17. Therefore, the Court GRANTS defendant's motion with respect to the first prong of the definition of "disability" under the Rehabilitation Act.

2. Record of a physical impairment

In a single paragraph, plaintiff contends that her audiological testing results demonstrate that she has a record of a disability. Specifically, plaintiff's test results found more than a 25dB difference between the hearing in the right and left ear. Benay Decl ., Ex. U at ¶ 5.

A record of an impairment "means [that the individual] has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k).

"The purpose of this provision is largely to protect those who have recovered or are recovering from substantially limiting impairments from discrimination based on their medical history." *Bailey v. Georgia-Pacific Corp.*, 306 F.3d 1162, 1169 (1st Cir.2002); *see also* 9 Lex K. Larson *Employment Discrimination* § 153.08, at 153-62 ("A worker without a current impairment may nevertheless benefit from ... protection if he or she has a record of a substantially limiting impairment"). Plaintiff has not produced any evidence that she has a medical history of hearing loss, as plaintiff was not aware of her limitation until the testing under the new CSO medical standards. Plaintiff also has not produced any evidence that she has recovered her ability to localize sound; in fact, plaintiff still has the impairment documented in her test results. Therefore, the Court GRANTS defendants' motion with respect to the second prong of "disability" under the Rehabilitation Act.

3. Regarded as having an impairment

Plaintiff asserts that she is "disabled" under the Rehabilitation Act because the USMS "regarded" her as having an impairment that substantially limits the major life activities of working and hearing.

In *Equal Employment Opportunity Commission v. United Parcel Service*, 306 F.3d 794 (9th Cir.2002)[2]the Ninth Circuit stated that "the Supreme Court has held that a person is 'regarded as' disabled (at least for purposes of the major life activity of working) if the covered entity 'mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities." ' 306 F.3d at 804 (citing

Murphy v. United Parcel Service, Inc., 527 U.S. 516, 521-22, 119 S.Ct. 2133, 144 L.Ed.2d 484 (1999)). The court then cited the following passage from *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999):

There are two apparent ways in which individuals may fall within this statutory definition: 1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or 2) a covered entity mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual--it must believe either that one has a substantial limiting impairment that one does not have or that one has a substantial limiting impairment when, in fact, the impairment is not so limiting. These misperceptions often result from stereotypic assumptions not truly indicative of individual ability.

EEOC v. UPS, 306 F.3d at 803.

The court also recognized that perceived impairments must be "substantially limiting and significant." *Id.* In *EEOC v. UPS*, the court dealt with an ADA claim by plaintiffs with monocular vision, who did not qualify as drivers because of defendant's vision protocol. When evaluating the claim of a plaintiff alleging that defendant "regarded" him as disabled, the Ninth Circuit found that in order to satisfy the requirements provided in *Sutton*, plaintiffs must demonstrate that defendant "regarded their vision impairment as substantially limiting their overall ability to see for

daily living." *Id.* at 806. Although *Sutton* applied to the major life activity of working, the court found the test to be equally applicable to seeing. *Id.* at 804. Therefore, the standard also applies for plaintiff's claim with respect to hearing.

i. Working

Working is a major life activity under the ADA. 29 C.F.R. § 1630.2(i). Additionally, the major life activity of work contains a specific definition of "substantially limits":

The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation on the major life activity of working. 29 C.F.R. § 1630.2(j)(3)(i).

Plaintiff presents no evidence that defendants mistakenly believe that plaintiff has a substantially limiting impairment that plaintiff does not actually have. Instead, the parties agree on the extent of plaintiff's impairment based on the auditory test results.

Plaintiff has presented evidence that defendants believed that plaintiff's limiting impairment could preclude her from various law enforcement positions. Benay Decl., Ex. E at 289; Benay Decl., Ex. F at 78. However, plaintiff's evidence is limited to active duty, weapons-carrying law enforcement positions. "An

active law enforcement position [is] not a broad enough job category to be a substantial limitation on working." *Bass v. The County of Butte*, 2004 WL 1925468, *5 (E.D.Cal.2004). For example, many courts have recognized that "being declared unsuitable for the particular position of police officer is not a substantial limitation of a major life activity." *Daley v. Koch*, 892 F.2d 212, 215-16 (2d Cr.1989); *see also Rossbach v. City of Miami*, 371 F.3d 1354, 1361 (11th Cir.2004).

Instead, the proper scope of plaintiff's occupation is "law enforcement generally." *Hughes v. Bedsole*, 48 F.3d 1376, 1388-89 (4th Cir.1995); *Papadopoulos v. Modesto Police Department*, 31 F.Supp.2d 1209, 1221 (E.D.Cal.1998) (holding that position of background investigator was "law enforcement work"); *Smaw v. Virginia Department of State Police*, 862 F.Supp. 1469, 1475 (E.D.Va.1994) (holding that former state trooper demoted to dispatcher was still employed in the law enforcement field). Plaintiff has presented no evidence of defendants' opinion regarding jobs in the field of law enforcement, other than active duty, weapons-carrying government law enforcement positions; therefore, plaintiff has failed to present any evidence in support of her claim that defendants regarded her as significantly restricted in performing a "class" or "broad range" of jobs under the Rehabilitation Act. The Court GRANTS defendants' motion for summary judgment with respect to the life activity of working.

ii. Hearing

Plaintiff alleges that defendants regard plaintiff as substantially limited in the major life activity of hearing. 29 C.F.R. § 1630.2(i); *see* 29 C.F.R. §

1360.2(j)(ii) (defining "substantial limitation" as "significantly restricted as to the condition, manner, or duration under which an individual can perform ... as compared to ... the average person in the general population"). Plaintiff must demonstrate that defendants regarded plaintiff as having an impairment that prevents or severely restricts use of her hearing in daily life. *EEOC v. UPS*, 306 F.3d at 806. It is not sufficient for plaintiff to demonstrate that defendants regarded plaintiff as having a limiting, but not substantially limiting, hearing impairment. *Id.* ***6** Plaintiff was found to be unable to localize sound based on auditory testing established by defendants. However, defendants' hearing requirement does not establish that defendants regard plaintiff as substantially limited in the life activity of hearing. *Sutton*, 527 U.S. at 490. Instead, "an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment ... are preferable to others, just as it is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job." *Id.* at 490-91.

Defendants have presented evidence that the hearing requirements solely relate to performing the essential functions of the CSO position. Roth Decl. at ¶ 8; Miller Decl. at ¶ 12; Barson Decl. at ¶ 5(a). In fact, Judge Roth, the chair of the United States Judicial Committee on Security and Facilities, stated that the policy "was in no way intended to reflect a CSO's ability to engage in life activities." Roth Decl. at ¶ 8; *see also* Miller Decl. at ¶ 12; Barson Decl. at ¶ 5(a). If the USMS recommends removal of the CSO based on medical disqualification, "the USMS does not consider whether the CSO's

medical condition ... affects his or her day-to-day activities. We are only concerned with whether the individual meets the CSO medical standards and is capable of performing the essential functions of the CSO position." Farmer Decl. at ¶ 36.

The determination of the essential CSO functions was made based on a report by Dr. Miller. In order to prepare his report, Dr. Miller visited five district courthouses and spoke with CSOs, federal judges, U.S. Marshals and Deputy U.S. Marshals. Miller Decl. at ¶ 8. Dr. Miller identified 29 essential job functions, which included the ability to determine the location of sound. Farmer Decl. at ¶ 26. Dr. Miller asserted that "[t]he safety of the federal judiciary, court personnel, and the public depends on CSO's ability to hear, localize, discriminate, recognize, and/or understand a variety of environmental and speech sounds." Miller Decl. at ¶ 20. Specifically, Dr. Miller found that CSOs "must be able to discern the direction of a disturbance or detect an approaching threat (sound localization)." *Id.* at ¶ 22.

Plaintiff took two medical examinations for the CSO position. Supp. Chelton Decl. at ¶¶ 7, 9. The results of both examinations were reviewed by Dr. Louis Chelton, a reviewing physician for Law Enforcement Medical Programs at the department of Federal Occupational Health. *Id.* at ¶ 1. Dr. Chelton found that plaintiff's "pure tone audiogram did not meet the required standard." Supp. Chelton Decl. at Ex. 1. According to Dr. Chelton the disparity between her right and left ear in her ability to detect sound would "impact her ability to perform the essential job function of localizing sound." *Id.* at ¶ 7.

Therefore, the "evidence bearing on [defendants'] perception of [plaintiff's] impairment indicates that its perception was not based upon speculation, stereotype, or myth," but was based upon medical test results. *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir.1995). When Dr. Chelton found that plaintiff was not medically qualified for the CSO position, he stated that "[w]ith only one functioning ear, you are unable to localize the direction of sound, an essential job function." Benay Decl., Ex. N at 2. However, none of the above evidence demonstrates that defendants regarded the inability to localize sound and discern the direction of a disturbance as a substantial limitation on hearing in plaintiff's daily life.

Plaintiff presents the declaration of Dr. Robert Sweetow, Director of Audiology at the University of California. *See* Supp. Simmons Decl., Ex. 1. In that declaration, Dr. Sweetow states that the ability to localize sound is "essential" to the manner in which individuals use their sense of hearing. *Id.* at 1. He concludes that "being unable to localize sound severely/significantly restricts one's hearing as compared to how unimpaired people normally hear in everyday life." *Id.* However, this evidence does not demonstrate that defendants regarded plaintiff's hearing impairment as "substantially limiting" her "overall ability to [hear] for daily living." *EEOC v. UPS*, 306 F.3d at 794. Instead, Dr. Sweetow provides his medical opinion regarding the general impact of an individual's inability to localize sound. Plaintiff also refers to a draft report on auditory localization prepared for United States Immigration and Naturalization Services by Dr. Lynn E. Cook, an occupational audiologist for the U.S. Naval Medical

Center. *See* Benay Decl., Ex. Z. In the October 2002 report, Dr. Cook states that auditory localization "allows us to pinpoint the direction of a yell for help or other sound of interest, locate an air leak on a vehicle, locate the position of another person, ... locate sounds to the floor above or below, [and] locate the direction and distance of a moving vehicle or an emergency siren." *Id.* at USA000573. Dr. Cook also states that "[p]erhaps most importantly, auditory localization allows the listener to quickly locate and attend to the speaker, especially when conversation switches rapidly between speakers." *Id.* However, Dr. Cook found that "[w]hile visual localization of a sound source is generally just as accurate, it is not nearly as efficient (quick) as auditory localization." *Id.* In summary, Dr. Cook determined that "[d]ifficulty in localizing environmental sounds can be inconvenient, and in some situations the impaired listener may be in danger." *Id.*

However, Dr. Cook's report does not demonstrate that defendants regarded plaintiff as disabled as defined under the Rehabilitation Act for many reasons. It is not clear that this excerpt is sufficient to find that Dr. Cook finds individuals who are unable to localize sound to be significantly limited in hearing in their daily life. Although Dr. Cook lists a number of activities affected by the inability to localize sound, she describes these problems as "inconvenient."

Assuming Dr. Cook finds that individuals who cannot localize are substantially limited in the activity of hearing, plaintiff has not demonstrated that defendants also regarded those individuals as disabled. Dr. Cook was not responsible for creating the CSO medical requirements; instead, she was "periodically

consult[ed]" by Dr. Miller. Miller Decl. at ¶ 24. Dr. Miller was responsible for drafting the policy and has testified that he did not consider an individual's ability to engage in life activities when creating the CSO medical standards. *Id.* at ¶ 12. Dr. Miller also did not rely upon Dr. Cook's opinions with respect to everyday activities, as the "standards reflect input we received from [Dr. Cook] regarding the hearing demands of this type of position and the problems associated with hearing aids." *Id.* at ¶ 24. There is no evidence that defendants considered Dr. Cook's positions with respect to the daily life activity of hearing. Again, every individual responsible for the creation and implementation of the CSO medical standards stated that the policy does not reflect any opinion about everyday life activities. Roth Decl. at ¶ 8; Miller Decl. at ¶ 12; Barson Decl. at ¶ 5(a); Farmer Decl. at ¶ 36.

Even if Dr. Cook's findings are applied to defendants, it is not sufficient to find that defendants regarded plaintiff as disabled in the major life activity of hearing under the Rehabilitation Act. In *Sutton*, the Supreme Court held that in order to find that a person is regarded as disabled, "it is necessary that a covered entity entertain misperceptions about the individual--it must believe either that one has a substantial limiting impairment that one does not have or that one has a substantial limiting impairment when, in fact, the impairment is not so limiting." *Sutton*, 527 U.S. at 489. Plaintiff has not presented any evidence that defendants have any "misperceptions" with respect to plaintiff's hearing. Plaintiff does not dispute the test results from multiple medical examinations or defendants' assertion that plaintiff, without hearing aids, has difficulty localizing sound. Nor does plaintiff

present any evidence that defendants believed plaintiff's hearing loss to be more substantial than it really was. Plaintiff also does not present any evidence that defendants have a misperception regarding the limitations of her impairment. In fact, plaintiff's expert, Dr. Sweetow, testifies that the inability to localize sound "severely/significantly restricts one's hearing as compared to how unimpaired people normally hear in everyday life." Supp. Simmons Decl., Ex. 1 at 1. Thus, plaintiff's expert finds that the limitation is as significant, if not more significant, as Dr. Cook's finding that the inability to localize sound is "inconvenient" because impaired individuals have difficulty performing some tasks. Given the overlap between Dr. Sweetow's and Dr. Cook's findings, plaintiff has failed to present any evidence that defendants had any "misperceptions" about plaintiff. Therefore, Dr. Cook's testimony does not support plaintiff's assertion that defendants' regarded her as disabled under the Rehabilitation Act.

Plaintiff's remaining evidence consists of the defendants' medical requirements for the CSO position and Dr. Chelton's review of plaintiff's examination results. As the Supreme Court found in *Sutton*, a hearing requirement alone is not sufficient to establish that defendants regarded plaintiff as substantially limited in the major life activity of hearing. Dr. Chelton's report only considers plaintiff's examination results with respect to her ability to perform the essential CSO functions. Dr. Chelton makes no reference to disabilities or limitations on daily life activities. Therefore, plaintiff has failed to present evidence that defendants regarded plaintiff as substantially limited in the major life activity of hearing

and the Court GRANTS summary judgment in favor of defendants.

B. Summary

As discussed above, plaintiff has failed to demonstrate that she is a person with a disability under any of the three definitions of disability in 42 U.S.C. § 12102(2). Being a person with a disability as defined under 42 U.S.C. § 12102(2) is one of the three requirements to stating a prima facie case under the Rehabilitation Act. Given that plaintiff has failed to present a prima facie case under the Rehabilitation Act, the Court GRANTS summary judgment in favor of defendant for plaintiff's Rehabilitation Act claim.

III. Administrative Procedures Act

Defendants bring a motion for summary judgment against plaintiff's Administrative Procedures Act claim. Plaintiff brings this claim in the alternative, in order to protect this cause of action if an appellate court finds that the USMS is not a joint employer of plaintiff.

However, this Court has found that the USMS meets the requirements of the joint employer test; therefore, plaintiff does not have a valid claim against defendant under the APA at this time. Defendants ask the Court to rule on the merits of plaintiff's claim at this time in order to avoid remand. The Court will not address the merits of a claim that currently is invalid. The Court GRANTS defendants' motion for summary judgment with respect to plaintiff's APA claim; however, if the Court's holding that the USMS is a joint employer is

reversed, the Court will address the merits of plaintiff's APA claim on remand.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS defendants' motion for summary judgment in its entirety. The pending motions in limine are denied as moot. [Docket 167, 168, 178, 193, 203, 213.

IT IS SO ORDERED.

Footnotes

FN1. The Court has reviewed and considered Plaintiff's Statement of Recent Decision and supplemental memo, filed July 25, 2005 (docket # 213).

FN2. This Court's January 20, 2005 order denying plaintiff's motion for summary judgment paid insufficient attention to the standards set out by the Ninth Circuit in EEOC v. UPS. Accordingly, they are set out at more length here.

05-17308

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NAOMI WALTON,
Plaintiff-Appellant,

v.

U.S. MARSHALS SERVICE; MARC A. FARMER, Chief, Judicial Protective Services-Judicial Security Division; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; BENIGNO G. REYNA, Director, United States Marshals Service; ALBERTO R. GONZALES, Attorney General,
Defendants-Appellees.

June 26, 2007, Decided

JUDGES: Before: Alfred T. Goodwin, Raymond C. Fisher, and Milan D. Smith, Jr., Circuit Judges.

OPINION

ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

The opinion filed on February 9, 2007 and published at 476 F.3d 723 is hereby AMENDED as follows:

On 476 F.3d at 731, following the heading reading "3. *Localizing Sound* " replace:

Walton further alleges that the USMS regarded her as disabled in the major life activity of localizing sound.

We decline to consider whether localizing sound could be an additional major life activity because Walton failed to raise this argument before the district court. *See Head v. Glacier Nw., Inc.*, 413 F.3d 1053, 1060 n.19 (9th Cir. 2005).

with:

Walton also alleges that the USMS regarded her as disabled because it regarded her as substantially limited in the activity of localizing sound. n1 In order to show that such a limitation is a disability within the meaning of the Acts, Walton must provide evidence that the ability to localize sound qualifies as a major life activity. *See Coons v. Sec'y of the United States Dep't of the Treasury*, 383 F.3d 879, 885 (9th Cir. 2004). We find that she has not.

"'Major life activities' . . . refers to those activities that are of central importance to daily life." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002); *see also Fraser v. Goodale*, 342 F.3d 1032, 1039 (9th Cir. 2003) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 638, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998)). To determine whether a proposed activity is a major life activity, we begin with the illustrative list in the implementing regulations which describes major life activities as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Bragdon*, 524 U.S. at 638 (quoting 45 C.F.R. § 84.3(j)(2)(ii) (1997) and 28 C.F.R. § 41.31(b)(2) (1997)). Because "[t]he plain meaning of the word 'major' denotes comparative importance," we then compare the proposed activity with the major life

activities enumerated in the regulations, noting that "the touchstone for determining an activity's inclusion under the statutory rubric is its significance." *Id.* (quoting *Abbott v. Bragdon*, 107 F.3d 934, 939-40 (1st Cir. 1997)) (internal quotation marks omitted).

The "comparative importance" standard requires that a proposed activity must be of comparable significance as an enumerated major life activity in order to qualify as a major life activity. For example, in *Bragdon*, the Supreme Court held that "reproduction [is] a major life activity, since reproduction could not be regarded as any less important than working and learning." 524 U.S. at 639. *See also Sinkler v. Midwest Prop. Mgmt. Ltd. P'ship*, 209 F.3d 678, 684-85 (7th Cir. 2000) ("getting to and from work" is not of equal significance to enumerated major life activities and thus is not a major life activity; "rather . . . [it] is a sub-species of the activity of 'working' or of 'driving'").

Walton provides no authority for her argument that the ability to localize sound is a major life activity. Instead, she claims that under our decision in *Head v. Glacier Northwest Inc.*, 413 F.3d 1053 (9th Cir. 2005), her experts' reports discussing the impact of the inability to localize sound on an individual's hearing should be considered evidence of comparative importance. Walton misreads *Head*. *Head* does not stand for the proposition that a proposed activity is a major life activity simply because it is "in some instances" necessary to the performance of an established major life activity. Such an expansive reading of "major life activity" would collapse into one the final two of the following three inquiries to determine the existence of a disability under our case law: "(1) we determine whether [the

alleged impairment] is a physical impairment, (2) we identify the life activity on which [plaintiff] relies, and we determine whether this activity is a major life activity, and (3) we determine whether the impairment substantially limits the major life activity." *Fraser*, 342 F.3d at 1038. As the Second Circuit explained in *Reeves v. Johnson Controls World Services, Inc.*:

An ADA plaintiff could considerably lessen the burden of making an individualized showing of a substantial limitation were he able to define the major life activity as narrowly as possible, with an eye toward conforming the definition to the particular facts of his own case. . . . Narrowing and diluting the definition of a major life activity, which in turn might lessen the plaintiff's burden of proving a substantial limitation, would undermine the role of the statute's "substantial limit[ation]" inquiry in ensuring that only impairments of some significance are protected by the ADA.140 F.3d 144, 152 (2d Cir. 1988). Thus, consistent with controlling precedent, our observation in *Head* that a proposed activity may be important because it "is necessary in many instances to perform" an enumerated major life activity does not obviate the need to meet the ultimate standard that a proposed activity must be "of comparative importance, and . . . central to most people's daily lives" in order to be considered a major life activity. *Head*, 413 F.3d at 1062.

Under the proper standard, the evidence in the record is insufficient to support Walton's assertion that the ability to localize sound is itself a major life activity. For the reasons discussed in the preceding section, we do not give any evidentiary weight to Dr. Sweetow's report. Walton's only other expert report is that

authored by Dr. Cook. In the light most favorable to Walton, Dr. Cook's report indicates that a complete inability to localize sound may severely impact how hearing is used in daily life. Dr. Cook's report does not, however, suggest that the ability to localize sound is comparable to "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" or that the ability to localize sound is itself central to an individual's life. Thus, on this record, we are unable to conclude that auditory localization is of comparative importance to the enumerated major life activities, and Walton therefore cannot sustain a claim that she was regarded as disabled because of her inability to localize sound.

With this amendment, the panel has voted to deny Appellant Naomi Walton's petition for rehearing. Judges Fisher and Smith have voted to deny the suggestion for rehearing en banc, and Judge Goodwin has recommended denying the suggestion for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.

Pursuant to General Order 5.3(a), subsequent petitions for rehearing or rehearing en banc may be filed concerning this amendment.

IT IS SO ORDERED.

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No. 07-405

FILED
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SUPREME COURT, U.S.

In the Supreme Court of the United States

NAOMI WALTON, PETITIONER

v.

UNITED STATES MARSHALS SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below erred in concluding that petitioner failed to demonstrate that respondents "regarded" her as disabled within the meaning of the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*

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In the Supreme Court of the United States

No. 07-405

NAOMI WALTON, PETITIONER

v.

UNITED STATES MARSHALS SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 18a-37a) is reported at 492 F.3d 998. The order of the district court granting summary judgment (Pet. App. 38a-56a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2007. An amended opinion was issued on June 26, 2007. A petition for rehearing was denied on September 7, 2007. The petition for a writ of certiorari was filed on September 24, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791, prohibits employment discrimination by fed-

eral agencies against qualified individuals with disabilities. The Rehabilitation Act incorporates the standards of the Americans with Disabilities Act of 1990 (ADA) to determine whether a person is an individual with a disability. 29 U.S.C. 791(g); see 29 C.F.R. 1614.203(b). The ADA defines the term "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual"; "a record of such an impairment"; or "being regarded as having such an impairment." 42 U.S.C. 12102(2).

2. Petitioner was employed by Akal Security, Inc., as a Court Security Officer in the United States District Court for the Northern District of California. Pet. App. 19a. Pursuant to Akal's contract with the United States Marshals Service (USMS), Court Security Officers must meet certain medical requirements, and must undergo annual physical examinations to assess their compliance with USMS standards. *Ibid.* The current standards are based on a study by the Office of Federal Occupational Health, adopted by the Judicial Conference of the United States, which identified particular job functions essential to the Court Security Officer position. *Id.* at 19a-20a. Among those essential job functions is "the ability to determine the location and source of sound." *Id.* at 20a.

In November 2001, as part of her required annual medical examination, petitioner took a hearing test. Pet. App. 20a. The results, which were reviewed by the Office of Federal Occupational Health, revealed a disparity in hearing between petitioner's two ears sufficiently great to affect her ability to localize sound. *Ibid.*

Consistent with USMS policy, petitioner was notified of the potentially disqualifying condition and afforded an opportunity to provide further information or test re-

sults before a final recommendation was made regarding her eligibility. Pet. App. 20a. Petitioner submitted a second hearing test; after analyzing the results, the Office of Federal Occupational Health concluded that petitioner was "[n]ot medically qualified to perform the essential functions" of the Court Security Officer position. *Ibid.* In particular, the medical review informed petitioner:

> You have a significant hearing impairment according to the results of the tests provided by you from Gould Medical Foundation. According to the test results you have only one functioning ear. With only one functioning ear, you are unable to localize the direction of sound, an essential job function. Hearing aids may malfunction or become dislodged in critical situations. Your job requires the ability to detect where sound is coming from. Your inability to do so poses a significant risk to the health and safety of yourself, other law enforcement officers, and the public.

Id. at 21a.

The USMS notified Akal that petitioner was not medically qualified to continue as a Court Security Officer, and Akal terminated her employment. Pet. App. 21a.

3. Petitioner brought suit against various federal agencies and officials, alleging she had been terminated in violation of the Rehabilitation Act and the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* Pet. App. 21a. Petitioner acknowledged that she does not actually have a disability, as that term is used in the Rehabilitation Act. *Id.* at 22a, 44a. She instead argued primarily that she is "a person with a disability within the meaning of the Acts because she was 'regarded as' disabled." *Id.*

at 22a, 45a. The district court rejected that claim and granted summary judgment for respondents, holding that petitioner had failed to establish a prima facie showing of disability under any definition. *Id.* at 38a-56a.

4. The Ninth Circuit affirmed. Pet. App. 18a-37a. The court of appeals held that, to state a "regarded as" disability claim, a plaintiff must show "that the employer believes that the plaintiff has some impairment, and provide evidence that the employer subjectively believes that the plaintiff is substantially limited in a major life activity." *Id.* at 25a; see *id.* at 23a (citing *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 489 (1999)). Absent "direct evidence" of such a "subjective belief," the court held that a plaintiff "must further provide evidence that the impairment imputed to the plaintiff is, objectively, a substantially limiting impairment." *Id.* at 25a. In all cases, the court noted, "a plaintiff must show that her employer regards her as substantially limited in a major life activity and not just unable to meet a particular job performance standard." *Id.* at 24a (citing *Murphy* v. *UPS*, 527 U.S. 516, 524 (1999)).

Applying that test, the court of appeals held that petitioner had produced no evidence that respondents regarded her as substantially limited in any major life activity. Although petitioner claimed that her disqualification under the USMS's hearing standards itself provided evidence that the USMS regarded her as substantially limited in the major life activity of hearing, the court rejected that argument, noting that evidence of a belief that petitioner could not safely perform her job is not equivalent to evidence that she was substantially limited in a major life activity. Pet. App. 25a-27a. Because the USMS's disqualification did not bear on how

it believed petitioner's hearing "compared to how unimpaired individuals normally use their hearing in daily life," the court held that petitioner had failed to show that the USMS had subjectively believed her limitation to be substantial when it was not. *Ibid.* (citing *Toyota Motor Mfg., Inc.* v. *Williams*, 534 U.S. 184, 200-201 (2002)).

The court of appeals found that petitioner also failed to demonstrate that her perceived inability to localize sound objectively constituted a substantial limitation on the major life activity of hearing. Petitioner's primary evidence in this regard was a report from her medical expert, which contained neither analysis nor a factual basis for its opinion. Pet. App. 27a-28a. The court held that such a "conclusory report fail[ed] to raise a genuine issue of material fact" as to the objective severity of petitioner's perceived impairment. *Ibid.* Petitioner's only other evidence was a report by Dr. Lynn Cook for the Immigration and Naturalization Service, stating that auditory localization was necessary for certain activities, but that visual cues could aid localization to compensate with only "minor drawbacks." *Id.* at 29a-30a. Reasoning that such compensatory measures "must be taken into account in judging whether an individual possesses a disability," the court held that petitioner had failed to raise a genuine issue of material fact concerning whether her inability to localize sound constituted a substantial limitation on hearing. *Id.* at 29a-30a (quoting *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 565 (1999)).*

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* Petitioner claims that these compensatory measures "had not previously been addressed by the parties or by the district court." Pet. 6. That contention is incorrect. The district court referred to Dr. Cook's finding that "visual localization of a sound source is generally just as

The court of appeals also rejected petitioner's claims that respondents regarded her as substantially limited in the activities of working and localizing sound. Pet. App. 30a-34a. The court rejected petitioner's working claim because she had offered no evidence about the range of jobs from which she might be precluded, and "[a]n allegation that the employer regards the impairment as precluding the employee from a single, particular position is insufficient" to support such a claim. *Id.* at 30a-31a (citing *Murphy*, 527 U.S. at 523). The court held that petitioner likewise "provide[d] no authority for her argument that the ability to localize sound is a major life activity." *Id.* at 33a.

Finally, the court of appeals rejected petitioner's argument that she is disabled on the basis of having a record of impairment because she had failed to raise a genuine issue of material fact concerning whether the impairment identified in her medical reports is substantially limiting. Pet. App. 35a (citing 29 C.F.R. 1630.2(k)).

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accurate" as auditory localization, though "not nearly as efficient," in determining that Dr. Cook's report regarded inability to localize sound as merely "inconvenient" and not necessarily substantially limiting. Pet. App. 52a. The government likewise argued before the Ninth Circuit that petitioner's perceived impairment should be evaluated by "taking into account any methods available for her to compensate for such an impairment," and that Dr. Cook's report showed that impaired auditory localization was at most "inconvenient" because "individuals may compensate for lost localization through 'non-acoustic cues' including sight and source familiarity, and * * * visual localization is 'generally just as accurate' as auditory localization, although it is not as quick." Gov't C.A. Br. 32-34 (citations omitted). Petitioner did not contest the propriety of considering that evidence until her petition for rehearing. C.A. Pet. for Reh'g 8-12 (Aug. 10, 2007).

ARGUMENT

The court of appeals correctly concluded that petitioner failed to make a prima facie showing that she is an individual with a disability within the meaning of the Rehabilitation Act. The court's decision is fact-bound and does not conflict with any decision of this Court or of any other court of appeals. This Court's review is therefore not warranted.

1. The court of appeals correctly concluded, based on the record evidence, that petitioner had not raised a genuine issue of material fact that respondents regarded her as disabled. Pet. App. 18a-37a.

a. To establish a prima facie claim of disability under the "regarded as" prong of the ADA's definition of disability, 42 U.S.C. 12102(2)(C), which is incorporated by the Rehabilitation Act, a plaintiff must show that a covered entity believes (1) that the plaintiff "has a substantially limiting impairment that [he or she] does not have," or (2) that the plaintiff "has a substantially limiting impairment when, in fact, the impairment is not so limiting." *Sutton* v. *United Airlines, Inc.*, 527 U.S. 471, 489 (1999).

Petitioner does not dispute the court of appeals' conclusion (Pet. App. 26a-27a) that she presented no direct evidence that respondents regarded her as substantially limited in a major life activity. Petitioner instead focuses (Pet. 11-13) on the court of appeals' discussion of whether petitioner may nevertheless establish a prima facie "regarded as" disability claim on the ground that respondents regarded her as having an impairment—the inability to localize sound—that, as an objective matter, substantially limits a major life activity. Petitioner contends that the court of appeals erred by considering mitigating measures—specifically, her ability to localize

sound by using visual cues, as opposed to auditory localization—in determining whether her perceived impairment in auditory localization was, as an objective matter, substantially limiting.

Petitioner's contention, which she raised for the first time in a petition for rehearing, see note *, *supra*, is incorrect. This Court has specifically stated that "mitigating measures must be taken into account" in determining whether a particular physical or mental impairment substantially limits a major life activity. *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 565 (1999); see *Murphy* v. *UPS*, 527 U.S. 516, 521 (1999). The Court has further noted that such measures include "measures undertaken, whether consciously or not, with the body's own systems." *Albertson's, Inc.*, 527 U.S. at 566.

Although the analysis in these cases concerned claims of actual disability, rather than "regarded as" disability, the court of appeals correctly determined that the same analysis applies in the circumstances of this case. See Pet. App. 29a. A plaintiff is "regarded as" disabled only if a covered entity believes that the plaintiff is actually disabled: that is, that the plaintiff has "a physical or mental impairment that substantially limits one or more * * * major life activities. 42 U.S.C. 12102(2)(A) and (C). The concepts of "substantially limits" and "major life activity" are the same whether a plaintiff alleges that she is actually disabled or that she is regarded as disabled. Thus, as the court of appeals concluded, when an employer believes that an individual has a physical or mental impairment but (1) the employer does not believe, as a subjective matter, that the impairment is substantially limiting, and (2) the impairment can be mitigated in such a way that the impairment does not, as an objective matter, substantially limit

major life activities, then the employer does not regard the plaintiff as disabled within the meaning of the Rehabilitation Act.

b. Petitioner contends that the decision below conflicts with this Court's decisions in *Sutton* and *Murphy*, which "decide[d] 'regarded as' disabled claims without consideration of the mitigating measures which overcame the actual disabilities." Pet. 8. That is incorrect. The Court in those cases had no occasion to consider mitigating measures in this context, since it held in both cases that petitioners' "regarded as" disability claims failed for other reasons. *Sutton*, 527 U.S. at 493 (holding that petitioners had failed to establish that they were regarded as substantially limited in the major life activity of working because they had alleged that their visual impairments were regarded as precluding them from holding only a single job, that of global airline pilot); *Murphy*, 527 U.S. at 525 (holding that the petitioner had failed to establish that he was regarded as substantially limited in the major life activity of working because "the undisputed record evidence demonstrate[d] that petitioner is, at most, regarded as unable to perform only a particular job").

c. Petitioner also contends (Pet. 11-12) that the decision below conflicts with the decisions of other courts of appeals. That contention is also incorrect. In *Rodriguez v. ConAgra Grocery Products Co.*, 436 F.3d 468 (2006), the Fifth Circuit, applying a Texas antidiscrimination statute modeled on federal antidiscrimination law, rejected an employer's argument that it had not regarded an employee as substantially limited in major life activities because he had diabetes, but rather because he was unable to control his diabetes, and that such "failure to control [a] controllable impairment" is not protected by

the ADA. *Id.* at 477-478. The Fifth Circuit concluded that a "failure to control" rule is inapplicable to "regarded as" disability claims, because "[n]o one can 'control' a nonlimiting impairment that *by definition is merely 'regarded as' substantially limiting.* Such an *imagined* condition cannot—and thus need not—be controlled." *Id.* at 479. In this case, because there is no evidence that respondents subjectively regarded petitioner's impairment as substantially limiting, the question, as the court of appeals formulated it, is whether respondents should nevertheless be considered to have regarded petitioner as disabled because they believed she had an impairment that was, as an objective matter, substantially limiting. The decision below properly proceeded on the premise that objectively limiting conditions, unlike "imagined" ones, can be mitigated; that conclusion does not conflict with the Fifth Circuit's decision in *Rodriguez.*

Nor does the decision below conflict with *MX Group, Inc.* v. *City of Covington*, 293 F.3d 326 (6th Cir. 2002). In that case, the Sixth Circuit held that, where the evidence showed that a city and related parties had withheld the necessary permission to open a methadone clinic because they believed that the clinic's potential clients would be recovering drug addicts whose addiction substantially limited their major life activities, see *id.* at 341-342, there was no need to consider the "mitigating effects of methadone" in applying the "regarded as" prong of the ADA's definition of disability, *id.* at 340. The Sixth Circuit did not, however, hold that such an inquiry would be inappropriate in a case, such as this, in which the record contained no similar evidence of subjective belief that the plaintiff had a substantially limiting impairment.

Finally, in *Capobianco* v. *City of New York*, 422 F.3d 47 (2005), the Second Circuit noted that "[a] 'regarded as' claim turns on the employer's perception of the employee and is therefore a question of intent, not whether the employee has a disability." *Id.* at 57 (internal quotation marks and citations omitted). The court did not, however, hold that consideration of whether a perceived impairment constitutes a disability, taking mitigating measures into account, is irrelevant to determining the employer's intent—particularly in a case in which the record contains no other indication that the employer perceived the plaintiff's impairment as substantially limiting.

2. Petitioner also contends (Pet. 13-16) that the court of appeals' analysis of the mitigating effects of visual localization conflicts with this Court's decision in *Sutton* and the decisions of other courts of appeals. That contention is without merit.

Contrary to petitioner's contention, the court of appeals in this case did not disregard *Sutton*'s conclusion that use of a mitigating measure "does not, by itself, relieve one's disability," and that an individual has a disability within the meaning of the ADA if, notwithstanding the use of mitigating measures, "that individual is substantially limited in a major life activity." 527 U.S. at 488. Rather, the court of appeals correctly applied that principle in this case. The court did not hold that visual localization, by itself, defeats a claim of disability; it rather held petitioner had presented no evidence showing that "auditory localization, as mitigated by visual localization, is an objectively severe restriction on the use of an individual's hearing compared to how unimpaired individuals normally use their hearing in daily life." Pet. App. 30a.

For similar reasons, the decision below does not conflict with *EEOC* v. *J.H. Routh Packing Co.*, 246 F.3d 850 (6th Cir. 2001), which reiterated that "[c]ontrolling a disability does not necessarily mean removing a disability." *Id.* at 855. The Sixth Circuit in *J.H. Routh* declined to dismiss a case at the pleadings stage without discovery into whether an individual's epilepsy was substantially limiting, despite the fact that he took medication to control its symptoms. *Id.* at 855. Petitioner, by contrast, was afforded the opportunity to demonstrate that an inability to localize sound remains substantially limiting even after compensating with visual cues. She failed to do so, and the court of appeals properly granted summary judgment to respondents. Pet. App. 29a-30a.

Nor does the decision below conflict with the Second Circuit's conclusion that "mitigation refers to amelioration of the impairment itself, not simple avoidance of activities affected by the impairment." *Capobianco*, 422 F.3d at 59 n.9. The court of appeals did not suggest that petitioner could mitigate her inability to localize sound by refraining from attempting to do so, but rather by supplementing auditory localization with visual localization. Nothing in *Capobianco* suggests that such mitigation should be ignored in determining whether an individual's perceived impairment rises to the level of a substantial limitation on a major life activity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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